9 FAM 41.53
NOTES

(CT:VISA-893; 06-06-2007)
(Office of Origin: CA/VO/L/R)

9 FAM 41.53 N1 INTRODUCTION

(TL:VISA-371; 03-15-2002)

a. The Immigration and Nationality Act of 1952 (Public Law 82-414 of June 27, 1952) created the H nonimmigrant visa classification at section 101(a)(15)(H) for temporary workers and trainees. Section 101(a)(15)(H) has been amended numerous times, most recently and significantly by the Immigration Nursing Relief Act of 1989 (Public Law 101-238 of December 18, 1989) creating the H-1A category (now expired), the Immigration Act of 1990 (Public Law 101-649 of November 29, 1990), with further modification by the Miscellaneous and Technical Immigration and Naturalization Amendments Act of 1991 (Public Law 102-232 of December 12, 1991) and the American Competitiveness and Workforce Improvement Act (Title IV of Subdivision C of Public Law 105-277 of October 21, 1998), and The American Competitiveness in the Twenty-first Century Act of 2000, Title 1 of Public Law 106-313.

b. The changes made by the Immigration Nursing Relief Act of 1989 expired on September 1, 1995 in accordance with the language of that Act. Therefore, no new H-1A category visas have been issued since that time. Nurses now must qualify pursuant to another nonimmigrant visa category, H-1B or H-1C.

c. The Immigration Act of 1990 (IMMACT 90), as amended, made the following major changes to the H nonimmigrant visa classification:

(1) In the H-1B category, replaced the previous standard of "distinguished merit and ability" with "specialty occupation," included "fashion models of distinguished merit and ability," imposed a requirement on prospective employers of most H-1B aliens to file a labor condition application with the Department of Labor, and redefined the requirements for "graduates of medical schools";

(2) Provided for the admission of nonimmigrants for cooperative research, development and co-production projects (H-1B aliens), and special education exchange visitor programs (H-3 aliens);

(3) Removed the presumption of immigrant intent to applicants for H-1

(and L-1) visas, and imposed a maximum length of stay for H-1 nonimmigrants of six years;

(4) Imposed a numerical limitation for H-1B and H-2B nonimmigrants; and

(5) Deleted the words "industrial" before "training" and Specified that training programs for H-3 nonimmigrants not be designed primarily to provide productive employment.

d. Among other changes, the American Workforce Competitiveness Act of 1998 temporarily increased the numerical limitation on H-1B nonimmigrants and attempted to protect U.S. specialty occupation workers from unfair foreign competition by placing restrictions on so-called "H-1B dependent employers", i.e., those with an unusually high ratio of H-1B employees.

e. The American Competitiveness in the Twenty-first Century Act of 2000:

(1) Raised the H-1B annual limit for FY 2001, 2002, and 2003; and retroactively raises the cap for FY 1999 and 2000;

(2) Attributed certain belatedly-approved H-1B petitions to the annual limit for FY 2000;

(3) Granted permission to H-1B applicants to change jobs while in the U.S. in certain instances;

(4) Extends the maximum length of stay beyond the currently authorized six years under specified circumstances;

(5) Extends the attestation and fee requirements through October 1, 2002, and investigative authorities under the 1998 Act through September 30, 2002; and

(6) Provides for the numerical restoration of H-1 visa numbers used for fraudulently obtained visas.

9 FAM 41.53 N2 SIGNIFICANCE OF APPROVED PETITION

9 FAM 41.53 N2.1 Department of Homeland Security Responsible for Adjudicating H Petitions

(TL:VISA-615; 04-28-2004)

By mandating a preliminary petition process, Congress placed responsibility and authority with Department of Homeland Security (DHS) to determine whether the alien meets the required qualifications for "H" status. The DHS

regulations governing adjudication of H petitions are complex, and consular officers shall normally rely on DHS expertise in this area.

9 FAM 41.53 N2.2 Approved Petition Is Prima Facie Evidence of Entitlement to H Classification

(CT:VISA-893; 06-06-2007)

a. An approved Form I-129, Petition for *a* Nonimmigrant Worker, or evidence that the H petition has been approved (an acceptable Form I-797, Notice of Action (see 9 FAM 41.53 N9.1 below), or telegraphic e-mail, or telephonic notification from Department of Homeland Security (DHS) or the Department) is, in itself, to be considered by consular officers as prima facie evidence that the requirements for H classification which are examined in the petition process have been met. Consular officers do not have the authority to question the approval of H petitions without specific evidence, unavailable to DHS at the time of petition approval, that the beneficiary may not be entitled to status. The large majority of approved H petitions are valid, and involve bona fide establishments, relationships, and individual qualifications that conform to the DHS regulations in effect at the time the H petition was filed.

b. On the other hand, the approval of a petition by DHS does not relieve the alien of the burden of establishing visa eligibility in the course of which questions may arise as to his or her eligibility to H classification. If information developed during the visa interview (e.g., evidence which was not available to DHS) gives the consular officer reason to believe that the beneficiary may not be entitled to status, the consular officer may request any additional evidence which bears a reasonable relationship to this issue. Disagreement with DHS interpretation of the law or the facts, however, is not sufficient reason to ask DHS to reconsider its approval of the petition.

9 FAM 41.53 N2.3 Referring Approved H Petition to Department of Homeland Security for Reconsideration

(CT:VISA-759; 08-15-2005)

You shall consider all approved H petitions in light of these Notes, process with dispatch those cases which appear legitimate, and identify those which require local investigation or referral to the approving U.S. Citizenship and Immigration Services (USCIS) office for reconsideration. Refer cases to USCIS for reconsideration sparingly, to avoid inconveniencing bona fide petitioners and beneficiaries and causing duplication of effort by USCIS. You must have specific evidence of a requirement for automatic revocation,

misrepresentation in the petition process, lack of qualification on the part of the beneficiary, or of previously unknown facts, which might alter USCIS's finding before requesting review of a Form I-129, Petition for a Nonimmigrant Worker approval. When seeking reconsideration, you must, under cover of Form DS-3096, Consular Return/Case Transfer Cover Sheet, forward the petition, all pertinent documentation, and a written memorandum of the evidence supporting the request for reconsideration to the Kentucky Consular Center (KCC), which will then forward the request to the approving USCIS office. The KCC will maintain a copy of the request and all supporting documentation, and will track all consular revocation requests. You are no longer required to maintain a copy of all documents, although scanning the revocation request and supporting documents into the case file is recommended.

9 FAM 41.53 N3 ISSUE OF TEMPORARINESS OF STAY

9 FAM 41.53 N3.1 H-1B Nonimmigrants

(TL:VISA-371; 03-15-2002)

H-1B aliens are specifically excluded from the intending immigrant presumption of section 214(b) of the INA and, moreover, are furthermore not required to have a residence abroad which they have no intention of abandoning. In addition, INA 214(h) provides that the fact that an alien has sought permanent residence in the United States does not preclude him or her from obtaining an H-1B nonimmigrant visa or otherwise obtaining or maintaining that status. The alien may legitimately come to the United States as a nonimmigrant under the or H-1B classification and depart voluntarily at the end of his or her authorized stay, and, at the same time, lawfully seek to become a permanent resident of the United States. Consequently, the consular officer's evaluation of an applicant's eligibility for an H-1B visa shall not focus on the issue of temporariness of stay or immigrant intent.

9 FAM 41.53 N3.2 H-2A, H-2B, and H-3 Nonimmigrants

(TL:VISA-64; 08-07-1992)

An applicant classifiable as an H-2A, H-2B, or H-3 alien must have a residence abroad and no intent to abandon that residence.

9 FAM 41.53 N4 DESCRIPTION OF H CLASSIFICATIONS AND PREREQUISITES FOR FILING H PETITIONS

9 FAM 41.53 N4.1 General Licensure Requirement for H Nonimmigrant

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

If the position to be occupied in the United States requires a state or local license for an individual to qualify for the position, an alien seeking H classification to fill that position must have that license before a petition can be approved on his or her behalf to confer H nonimmigrant status. (Other than employment as physicians, see 9 FAM 41.53 N4.2-3 through 9 FAM 41.53 N4.2-6 below), aliens seeking employment in health care occupations at the time of visa issuance or change of status must have a certification from the Commission on Graduates of Foreign Nursing Schools (CGFNS) or a similar organization approved by the Attorney General that verifies the alien's qualifications for the position and the alien's competency in the English language.

9 FAM 41.53 N4.2 H-1B Nonimmigrants

(TL:VISA-206; 05-22-2000)

The H-1B classification applies to an alien who is coming temporarily to the United States to perform services in one of the categories described below.

9 FAM 41.53 N4.2-1 Aliens in Specialty Occupations

(TL:VISA-615; 04-28-2004)

a. Aliens who are qualified to perform services in a specialty occupation as described in INA 214(i)(1) and (2) (other than agricultural workers, or aliens qualifying under INA 101(a)(15)(O) or (P)) are classifiable as H-1B nonimmigrants. A specialty occupation requires the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) for entry into the occupation. An alien seeking to work in a specialty occupation must have completed such a degree or have experience in the specialty equivalent to the completion of the degree (as determined by Department of Homeland Security (DHS)) and expertise in the specialty through progressively responsible positions relating to the specialty.

b. The criteria for qualifying as an H-1B physician are found at 9 FAM 41.53 N4.2-3 through 9 FAM 41.53 N4.2-6 below.

c. Prior to filing a petition with the DHS on behalf of an alien in a specialty occupation, the prospective employer must have filed a labor condition application (see 9 FAM 41.53 N6 below) with the Department of Labor (DOL) as specified in INA 212(n)(1). The filing of a labor condition application does not constitute a determination that the occupation in question is a specialty occupation. DHS is responsible for determining whether the application involves a specialty occupation and whether the particular alien for whom H-1B status is sought qualifies to perform services in that occupation.

9 FAM 41.53 N4.2-2 Certain Fashion Models

(TL:VISA-615; 04-28-2004)

a. H-1B classification may be granted to an alien who is of distinguished merit and ability in the field of fashion modeling. "Distinguished merit and ability" is defined by DHS as prominence, i.e., the attainment of a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading or well-known in the field. Such an alien must also be coming to the United States to perform services which require a fashion model of prominence.

b. The prospective employer of a fashion model of distinguished merit and ability must file a labor condition application (see 9 FAM 41.53 N6 below) with the Department of Labor (DOL) prior to filing a petition for the alien.

9 FAM 41.53 N4.2-3 Graduates of Foreign Medical Schools

(TL:VISA-64; 08-07-1992)

An alien graduate of a medical school, as defined in INA 101(a)(41), may enter the United States as an H-1B nonimmigrant to perform services as a member of the medical profession if he or she has a full and unrestricted license to practice medicine in a foreign state, or has graduated from a medical school in a foreign state, and meets the requirements of 9 FAM 41.53 N4.2-5 or 9 FAM 41.53 N4.2-6 below.

9 FAM 41.53 N4.2-4 Coming to Teach or Conduct Research

(TL:VISA-64; 08-07-1992)

An alien physician may be classified H-1B if he or she is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency. Such an alien may only engage in direct patient care that is incidental to his or her teaching and/or research.

9 FAM 41.53 N4.2-5 Coming to Perform Direct Patient Care

(TL:VISA-64; 08-07-1992)

An alien physician may engage in direct patient care in the United States as an H-1B nonimmigrant if he or she:

(1) Has a license or other authorization from the state of his or her intended employment, if the state requires a license or authorization;

(2) Has passed the United States Medical Licensing Exam (USMLE); and

(3) Has competency in oral and written English which is demonstrated by:

(a) Having passed the English language proficiency test given by the Educational Commission for Foreign Medical Graduates (ECFMG); or

(b) Having graduated from a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education, whether or not the school is located in the United States.

9 FAM 41.53 N4.2-6 Alien Graduates of United States Medical Schools

(TL:VISA-64; 08-07-1992)

An alien graduate of a medical school in the United States may perform any medical service as an H-1B nonimmigrant, including services primarily involving direct patient care, provided that he or she is licensed or otherwise authorized to practice in the state of intended employment.

9 FAM 41.53 N4.2-7 Alien Physicians Not Eligible for H-2B or H-3 Classification

(TL:VISA-64; 08-07-1992)

Alien physicians who are coming to the United States to perform medical services or receive graduate medical training are statutorily ineligible to receive H-2B or H-3 status. Such aliens must qualify for H-1B, J-1, or immigrant visas.

9 FAM 41.53 N4.2-8 Aliens in Department of Defense Cooperative Research and Development or co-production Projects

(TL:VISA-615; 04-28-2004)

a. Aliens coming to the United States, pursuant to Section 222 of the Immigration Act of 1990, to participate in a cooperative research and development project or a co-production project under a government-to-government agreement administered by the Department of Defense (DOD) are classifiable as H-1B nonimmigrants. Such aliens must perform services of an exceptional nature requiring exceptional merit and ability. For purposes of this classification, services of an exceptional nature shall be those which require a baccalaureate or higher degree (or its equivalent, as determined by Department of Homeland Security (DHS)) to perform the duties.

b. The requirement for filing a labor condition application with the Department of Labor (DOL) does not apply to petitions involving DOD cooperative research and development or co-production projects.

9 FAM 41.53 N4.3 H-1C Nonimmigrants

(TL:VISA-371; 03-15-2002)

Section 2 of the Nurses for Disadvantaged Areas Act of 1999 (NRAA), Public Law 106-95), established for four years a new category, H-1C, for nonimmigrant nurses who will serve in certain medically under served areas. It is effective from the date of enactment, November 12, 1999, but will require the promulgation of regulations in order to actually be implemented. A nurse's period of stay in the United States in the H-1C category is limited to three years. Additionally, section 3 of the NDAA amends INA 212 by adding new subsection (r) that exempts certain nurses, regardless of visa category, from the certification requirements of INA 212(a)(5)(C). The Service published regulations on June 11, 2001, effective that date, which, among other things, includes (with the Department's concurrence) a blanket INA 212(d)(3)(A) waiver of INA 212(a)(5)(C) for all nonimmigrant aliens pending further regulations. The implementation of the new H-1C classification also thus became effective as of June 11, 2001, and, as the 4-year limit was to start after the promulgation of regulations, the program must end by June 11, 2005.

9 FAM 41.53 N4.3-1 Requirements for an H-1C

(TL:VISA-371; 03-15-2002)

A nurse seeking a new H-1C visa must meet the following requirements:

(1) Have a full, unrestricted license to practice in the country of his or her nursing training or have been trained in the United States;

(2) Have passed the examination given by the Commission on Graduates of Foreign Nursing Schools (CGFNS) or have a full, unrestricted license in the State in which the alien will practice, or

in any state or territory of the United States and have been given temporary authorization for employment in the state of intended employment; and

(3) Be fully qualified and eligible for employment immediately upon admission.

9 FAM 41.53 N4.3-2 Exemption from INA 212(a)(5)(C)

(TL:VISA-615; 04-28-2004)

A new provision, INA 212(r), will exempt nurses from INA 212(a)(5)(C) when regulations implementing it have been published. In the interim, as noted in 9 FAM 41.53 N4.3, Visa Office (VO) and Department of Homeland Security (DHS) have granted a blanket waiver of this provision for all nonimmigrant health-care aliens. For specifics, see INA 212(a)(5)(C) and INA 212(r).

9 FAM 41.53 N4.4 H-2A Nonimmigrants

(TL:VISA-615; 04-28-2004)

a. The H-2A classification applies to aliens who are coming temporarily to the United States to perform agricultural work of a temporary or seasonal nature.

b. The prospective employer must file a temporary agricultural labor certification with the Department of Labor (DOL) prior to filing a petition with DHS to classify an alien as an H-2A nonimmigrant.

9 FAM 41.53 N4.5 H-2B Nonimmigrants

(TL:VISA-615; 04-28-2004)

a. The H-2B classification applies to aliens who are coming temporarily to the United States to perform nonagricultural service or labor of a temporary or seasonal nature, other than graduates of medical schools coming to provide medical services, if unemployed persons capable of performing such work cannot be found in the United States.

b. This classification requires a temporary labor certification issued by the Department of Labor (DOL) or the Government of Guam, or a notice from one of these agencies that such a certification cannot be made, prior to the filing of a petition with DHS to confer H-2B status.

9 FAM 41.53 N4.5-1 H-2R Nonimmigrants

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

a. The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Public Law 109-13, 119 Statute 231, was signed into law by the President on May 11, 2005. The Act provides that if an applicant has been issued a visa based on an approved petition in any of the previous three fiscal years, the applicant is not counted against the current fiscal year's annual limit. The applicant must have a petition from the DHS certifying that he is a returning worker, and you must have verification from Kentucky Consular Center (KCC) that a qualifying H2B visa was issued, or you must verify that the applicant was issued a H2B visa in at least on of the previous three fiscal years prior to the fiscal year of the approved start date of the worker's petition. You then should issue a H2R visa to the worker, provided he or she is otherwise qualified.

b. KCC will check all H2B petitions on which DHS has indicated the beneficiary is a returning worker. If the H2B petition has only one person, KCC will stamp the petition with one of the following stamps:

    A) Returning worker verified by KCC

    B) Possible returning worker determined by KCC

    C) No evidence of Returning worker determined by KCC

    If the H2B petition has multiple names, KCC will stamp the petition:

    INCLUDES RETURNING WORKERS, SEE ATTACHED

The attachment will be a spreadsheet containing the KCC receipt date, petitioner and receipt number, employee name, DOB, POB, and will note if each employee is A, B, or C above.

You can rely on KCC's verification if KCC indicated that it has verified issuance of a qualifying H2B visa. However, in some cases there will not be enough biographic data available to confirm previous issuance. If KCC has been unable to confirm that the individual is a returning worker, you will need to verify the previous issuance of an H2B.

9 FAM 41.53 N4.5-2 H-2R Claims and Refusal Codes

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

a. If an applicant claims entitlement to H2R status, but you find that the applicant was not issued a visa previously, you may still process the applicant under the H2B category if the applicant is otherwise qualified and there are still numbers available under the annual limit. We report to USCIS the number of workers claiming H2R status who are ultimately issued H2Bs, so that CIS may reduce the annual limit accordingly. In order to track these numbers, we have created a new quasi-refusal code

P2HR. Please enter this refusal code before approving a H2B visa for an applicant who has claimed status under H2R.

9 FAM 41.53 N4.6 H-3 Nonimmigrants

(TL:VISA-64; 08-07-1992)

The H-3 classification applies to an alien who is coming temporarily to the United States for one of the purposes described below.

9 FAM 41.53 N4.6-1 Alien Trainees

(TL:VISA-615; 04-28-2004)

An alien who seeks to enter the United States to receive training in any field of endeavor, other than to receive training provided primarily at or by an academic or vocational institution or graduate medical education or training, is classifiable as an H-3 nonimmigrant. (For H-3 nurses and medical students, see 9 FAM 41.53 N20 and 9 FAM 41.53 N21, respectively.)

9 FAM 41.53 N4.6-2 Alien Participants in Special Education Exchange Visitor Program

(TL:VISA-615; 04-28-2004)

a. A participant in a special education exchange visitor program, described in section 223 of the Immigration Act of 1990, is entitled to H-3 status. The alien must be coming to the United States to participate in a structured program with a professionally trained staff that provides practical training and hands-on experience in the education of children with physical, mental, or emotional disabilities.

b. Certain restrictions imposed by Department of Homeland Security (DHS) on the approval of petitions filed on behalf of H-3 trainees do not apply to petitions for H-3 participants in a special education exchange visitor program.

9 FAM 41.53 N5 NATURE OF POSITION OR TRAINING FOR H NONIMMIGRANTS

9 FAM 41.53 N5.1 H-1B Nonimmigrants

(TL:VISA-64; 08-07-1992)

An alien may be classified H-1B whether the position to be temporarily occupied is permanent or temporary in nature. For example, a foreign

professor coming to fill a position on the faculty of a U.S. university could be classified H-1B.

9 FAM 41.53 N5.2 H-2A and H-2B Nonimmigrants

(TL:VISA-615; 04-28-2004)

An H-2A or H-2B nonimmigrant must be coming to fill a position that is temporary in nature. He or she may not be classified H-2A or H-2B for the purpose of occupying a permanent or indefinite position, except in the case of sheepherders (see 9 FAM 41.53 N23 below).

9 FAM 41.53 N5.3 H-3 Nonimmigrants

(TL:VISA-64; 08-07-1992)

An alien may not be classified H-3 if his or her training program is primarily designed to provide productive employment, except in the case of a participant in a special education exchange visitor program which is described in section 223 of the Immigration Act of 1990.

9 FAM 41.53 N5.4 Using B-1 in Lieu of H Classification

(TL:VISA-64; 08-07-1992)

For a discussion of whether or not a B-1 in lieu of H classification may be used, (see 9 FAM 41.31 N8).

9 FAM 41.53 N6 LABOR CONDITION APPLICATION FOR H-1B NONIMMIGRANTS

(CT:VISA-893; 06-06-2007)

Prior to filing a Form I-129, Petition for *a* Nonimmigrant Worker, with Department of Homeland Security (DHS) for an H-1B nonimmigrant (other than an alien in a Department of Defense (DOD) research and development or co-production project), the employer must file a labor condition application with the Department of Labor (DOL). The labor condition application must state that:

(1) The employer is offering and will pay the alien the greater of the actual or prevailing wage paid to all other workers with similar experience and qualifications for the specified employment in the area of employment;

(2) The employer will provide working conditions for the alien that will

not adversely affect the working conditions of workers similarly employed; and

(3) There is no current strike or lockout as a result of a labor dispute in the occupational classification at the place of employment.

9 FAM 41.53 N7 LABOR ATTESTATION FOR H-1C NONIMMIGRANTS

(TL:VISA-322; 10-10-2001)

Approval of a petition for a H-1C nonimmigrant is contingent on a certification from the Department of Labor (DOL) that a current attestation from the employing institution has been filed under terms described in INA 212(m)(2).

9 FAM 41.53 N8 PETITION PROCEDURES

9 FAM 41.53 N8.1 Using Form I-129, Petition for Nonimmigrant Worker

(CT:VISA-893; 06-06-2007)

a. An employer must file a Form I-129, Petition for *a* Nonimmigrant Worker with Department of Homeland Security (DHS) to accord status as a temporary worker or trainee. Form I-129 is also used to request extensions of petition validity and extensions of stay in H status. The form must be filed with the DHS Service Center which has jurisdiction over the area where the alien will perform services or receive training.

b. More than one beneficiary may be included in an H-2A, H-2B, or H-3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time and in the same location.

9 FAM 41.53 N8.2 Notifying Petitioner of Petition Approval

(TL:VISA-615; 04-28-2004)

DHS uses Form I-797, Notice of Action, to notify the petitioner that the H petition filed by the petitioner has been approved or that the extension of stay in H status for the employee has been granted. The petitioner may furnish Form I-797 to the employee for the purpose of applying for his or her H visa, or to facilitate the employee's entry into the United States in H

status, either initially or after a temporary absence abroad during the employee's stay in H status (also see 9 FAM 41.53 N9.1 below).

9 FAM 41.53 N8.3 "NAFTA Professional" (TN) Status in Lieu of H-1B Petition for Canadian Citizens

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

No visa, prior petition, labor condition attestation, or prior approval is required for a Canadian citizen who is a business person seeking to enter the United States temporarily to engage at a professional level in one of the professional activities listed in Chapter 16 Appendix 1603.D.1 of the North American Free Trade Agreement (NAFTA). Engaging in a professional activity listed in this appendix would not necessarily result in qualification for H-1B status. The criteria used to develop Appendix 1603.D.1 differ from the statutory requirements for determining H-1B classification. To qualify for "TN" status, the alien must present supporting documentation to an immigration officer at the port of entry demonstrating that he or she seeks entry to engage in a listed profession at a professional level and meets the criteria to perform at that level. (See also 9 FAM 41.59 Notes).

NOTE: Although Mexico is a party to the NAFTA and Mexican nationals may be accorded TN status, they are not exempt from the petition, labor attestation and visa requirements of ten INA. Processing of TN visas for Mexican nationals is identical to H-1B processing for other nationalities. However, Mexican nationals are accorded a numerical allocation of visas outside of the H-1B numerical cap.

9 FAM 41.53 N8.4 Filing H Petitions for Visa-Exempt Aliens

(TL:VISA-615; 04-28-2004)

Except with regard to Chapter 16, Appendix 1603.D.1 professionals described in 9 FAM 41.53 N8.3 above, the petitioner must file a petition in advance with Department of Homeland Security (DHS), and the visa-exempt beneficiary must present a copy of Form I-797, Notice of Action, at a port of entry.

9 FAM 41.53 N9 ISSUING H VISAS

9 FAM 41.53 N9.1 Evidence Forming Basis for H

Visa Issuance

(CT:VISA-893; 06-06-2007)

The basis for H visa issuance consists of an approved Form I-129, Petition for *a* Nonimmigrant Worker, telegraphic, e-mail, or telephonic notification from DHS or the Department of the approval of such a petition, or a Form I-797, Notice of Action, presented by the visa applicant. The Form I-797 must show either that the petition on his or her behalf has been approved or that his or her authorized stay in H status has been extended. This Form I-797, printed on blue paper, must include the date of the Notice, the name of the petitioner, the name of the beneficiary, the petition/receipt number, the expiration date of the petition, and the name, address, and telephone number of the approving DHS office. It is a computer-generated form and is not signed. The only Form I-797 that is valid for visa issuance is one that, at a minimum, contains the above information. If a post has any question regarding the bona fides of a Form I-797, it should query the originating DHS office directly.

9 FAM 41.53 N9.2 Validity of H Visas

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

a. The validity of an H visa may not exceed the period of validity of a petition approved to accord H status or the period for which the alien's authorized stay in H status was extended. If the period of reciprocity is less than the validity period of the approved petition or extension of stay, the period permitted by the reciprocity schedule shall prevail. If the alien's prior visa and petition have expired, the alien is not eligible to receive a new visa until the pending petition has been approved.

b. Posts are authorized to accept H visa petitions and issue visas to qualified applicants up to 90 days in advance of applicants' beginning of employment status as noted on the Form I-797, Notice of Action. Post must inform applicants verbally and in writing that they can only use the visa to apply for reentry to the U.S. starting ten days prior to the beginning of the approved status period noted on their Form I-797. In addition, such visas must be annotated, "Not valid until (ten days prior to the petition validity date.)"

c. When there is no change of employers, and no gap in authorized status, an alien may obtain an H-1B visa that is valid during the time remaining on the first petition (and/or any extensions) and the validity of the second petition, and does not have to wait until 10 days before the start date of the second petition to reenter the U.S.

9 FAM 41.53 N9.2-1 Validity of H1-B visas When Change of Employer Pending

(TL:VISA-615; 04-28-2004)

a. Public Law 106-313 provides for "portability" for H1-B aliens, permitting them to change jobs while the application filed by their new employer is still pending approval by Department of Homeland Security (DHS). In order to change employers which penalty, H1-B aliens must meet the following conditions:

(1) The alien had been lawfully employed;

(2) The new employer filed a petition for the alien prior to the expiration of his or her authorized stay; and

(3) The alien had not worked without authorization prior to the filing of that new petition.

b. If the alien's prior visa and petition have expired, the alien is not eligible to receive a new visa until the pending petition has been approved.

9 FAM 41.53 N9.2-2 H1-B Aliens May Travel Abroad While Change of Employer Pending

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

H1-B aliens traveling abroad during the period when their new employment petition is pending may use their old petition and visa for return to the United States provided the applicant:

(1) Is otherwise admissible;

(2) Has a valid passport and visa (whether new or the original visa with the prior employer’s name);

(3) Has the prior Form I-94, Arrival and Departure Record, a Form I-797, Notice of Action, or a copy thereof, showing the original petition's validity dates; and

(4) Has a dated filing receipt or other evidence that a new petition was filed in a timely fashion.

9 FAM 41.53 N9.2-3 Validity of H-1B When There is a Change of Employer

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

a. After changing H-1B employers in accordance with DHS procedures for making such a change, an H-1B visa holder may continue to use his or

her original H-1B visa for entry into the United States. Upon applying for entry, the visa holder must present the new Form I-797, Notice of Action, evidencing the approval of the change of employer in addition to the visa.

b. An H-1B applicant can change employers without penalty while in the United States provided the following criteria were met:

(1) The alien was lawfully admitted to the United States;

(2) The new employer filed the petition for the alien prior to the expiration of his or her authorized stay;

(3) The alien had not worked without authorization prior to the filing of the new petition; and

(4) Has not been employed in the United States without authorization subsequent to lawful admission but before filing such petition.

After the filing of the new petition the H-1B is authorized to accept employment until the petition is adjudicated. If the new petition is denied, employment must cease. If the alien's prior visa and petition have expired, the alien is not eligible to receive a new visa until the pending petition has been approved.

9 FAM 41.53 N9.2-4 Limiting Validity of H Visas

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

a. Consular officers may restrict visa validity in some cases to less than the period of validity of the approved petition or authorized period of stay (for example, on the basis of reciprocity or the terms of a waiver of a ground of ineligibility). In any such case, in addition to the other notations required on the H visa, posts shall insert the following:

- "PETITION VALID/STAY AUTHORIZED (whichever is applicable) TO (date)"

b. Posts should use appropriate operating instructions for annotating visas.

9 FAM 41.53 N9.2-5 Job Flexibility for Long-delayed Applicants for Adjustment of Status to LPR

(TL:VISA-371; 03-15-2001)

INA 204(j) provides that if an H-1(B) alien, whose employer has filed for permanent residence status for him or her as an employment-based immigrant under INA 204(a)(1)(D), changes employers or jobs, the petition and the labor certification approved for the original employer will remain valid if:

(1) The petition of the new employer has remained unadjudicated for

180 days or more, and

(2) The new job is in the same or a similar occupational classification as the job for which the petition was filed.

9 FAM 41.53 N9.2-6 Reissuance of Limited H Visas

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

When an H visa has been issued with a validity of less than the validity of the petition or authorized period of stay, consular officers may reissue the visa any number of times within the period allowable. If a fee is prescribed in the reciprocity schedule, posts must collect the fee for each reissuance of the H visa.

9 FAM 41.53 N9.2-7 Issuing Single H Visa Based on More Than One Petition

(TL:VISA-64; 08-07-1992)

If an alien is the beneficiary of two or more H petitions and does not plan to depart from the United States between engagements, consular officers may issue a single H visa valid until the expiration date of the last expiring petition, reciprocity permitting. In such a case, the required notations from all petitions should be placed below the visa.

9 FAM 41.53 N9.3 Multiple Beneficiaries

(TL:VISA-322; 10-10-2001)

More than one beneficiary may be included in an H-2A, H-2B or H-3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time and in the same location.

9 FAM 41.53 N9.4 Beneficiaries with More than One Employer

(TL:VISA-322; 10-10-2001)

If a nonagricultural beneficiary is performing services for or receiving training from more than one employer, each employer must file a petition unless an established agent files the petition.

9 FAM 41.53 N9.5 Substitution of Beneficiaries

(TL:VISA-615; 04-28-2004)

Beneficiaries may be substituted in an H-2B petition approved on behalf of a group or for unnamed beneficiaries, or when the job offer does not require any education, training, and/or experience. (See Department of Homeland Security (DHS) regulation at 8 CFR 214.2(h)(2)(iv)).

9 FAM 41.53 N10 VALIDITY OF APPROVED PETITIONS

9 FAM 41.53 N10.1 Initial Period of Approval

(TL:VISA-615; 04-28-2004)

DHS has established the following initial approval period of an H petitions:

(1) An approved H-1B petition for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application;

(2) An approved H-1B petition for a fashion model of distinguished merit and ability shall be valid for a period of up to three years;

(3) An approved H-1B petition involving a participant in a Department of Defense (DOD) research and development or co-production project shall be valid for a period of up to five years;

(4) An approved H-2A petition is valid through the expiration of the relating labor certification;

(5) An approved H-2B petition shall be valid for a period of up to one year;

(6) An approved H-3 petition for an alien trainee shall be valid for a period of up to two years; and

(7) An approved H-3 petition for an alien participating in a special education exchange visitor program shall be valid for a period of up to 18 months.

9 FAM 41.53 N10.2 Petition Extension

(CT:VISA-893; 06-06-2007)

A petitioner wishing to extend the validity of an A petition must file a request for a petition extension on Form I-129, Petition for *a* Nonimmigrant Worker. Supporting evidence is not required unless requested by Department of Homeland Security (DHS). A request for a petition extension may be filed only if the validity of the original petition has not expired.

9 FAM 41.53 N10.3 Validity of H-1B Petition When Company Restructures

(TL:VISA-322; 10-10-2001)

An H-1B petition remains valid if a company is involved in a corporate restructuring, including but not limited to, a merger, acquisition or consolidation if:

(1) The new corporate entity interests and obligations remain the same; and

(2) The terms and conditions of employment remain the same.

9 FAM 41.53 N11 LENGTH OF STAY

(TL:VISA-371; 03-15-2002)

An H petition beneficiary will be admitted to the United States for the validity period of the petition, plus a period of up to ten days before the validity period of the petition begins (except for H-2A aliens, who may enter up to one week before the beginning of the approved period) and ten days after it ends. The beneficiary may not work except during the validity period of the petition.

9 FAM 41.53 N12 EXTENSION OF STAY PROCEDURES

(TL:VISA-615; 04-28-2004)

The petitioner shall request the extension of an alien's stay in the United States on the same Form I-129, Petition for a Nonimmigrant Worker, used to file for the extension of the alien's petition. The effective dates of the petition extension and of the beneficiary's extension of stay shall be the same. The beneficiary must be physically present in the United States at the time the extension of stay petition is filed. If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may ask DHS to cable notification of the petition extension to the consular office abroad where the alien will apply for a visa. When the maximum allowable period of stay in an H classification has been reached (see 9 FAM 41.53 N13 below), no further extensions may be granted.

9 FAM 41.53 N13 EXTENSION PERIODS AND MAXIMUM TOTAL PERIODS OF STAY

(TL:VISA-64; 08-07-1992)

The petitioner may apply for the extension of an alien's stay in the United States up to the maximum total period of stay for each H category described below.

9 FAM 41.53 N13.1 H-1B Nonimmigrants

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

a. For an alien in a specialty occupation, or for a fashion model of distinguished merit and ability, an extension of stay may be authorized for a period of up to three years. The alien's total period of stay may not exceed six years.

b. For an alien participating in a Department of Defense (DOD) research and development or co-production project, an extension of stay may be authorized for a period of up to five years. The total period of stay may not exceed ten years.

c. Department of Homeland Security (DHS) may extend H-1B status in one year increments if the alien has an employment-based immigrant petition or an adjustment of status application pending and it has been more than 365 days since the labor certification application or the petition was filed. An alien whose application for adjustment of status has remained unadjudicated for 180 days or more may change employers within the same or similar occupational clarification without having to obtain approval of a new petition.

d. The six and ten-year limits do not apply if the applicant has had a petition to adjust status or receive immigrant status pending at DHS for more than 365 days. The limits also do not apply if the filing of a labor certification on the alien's behalf (if filing is required under INA 203(b)) has been pending for 365 days or more.

e. Under the American Competitiveness in the Twenty-first Century Act of 2000 (Section 104(c) of AC21), an alien may be approved for an extension of his or her H-1B visa for a period of up to three years beyond the 6-year limit. An approved Form I-140 Immigrant Petition for Alien Worker from USCIS is required for an alien to qualify for the three year extension.

f. DHS will extend the stay of aliens who qualify for the above exemption in one-year increments until a final decision is made on the alien's petition.

9 FAM 41.53 N13.2 H-1C Nonimmigrant Nurses

(TL:VISA-322; 10-10-2001)

A nurse's period of stay in the United States in the H-1C category is limited to three years.

9 FAM 41.53 N13.3 H-2A and H-2B Nonimmigrants

(TL:VISA-64; 08-07-1992)

An extension of stay for the beneficiary of an H-2A or H-2B petition may be authorized for the validity of the labor certification or for a period of up to one year. The alien’s total period of stay may not exceed three years, except that in the Virgin Islands, the alien’s total period of stay may not exceed 45 days.

9 FAM 41.53 N13.4 H-3 Nonimmigrants

(TL:VISA-64; 08-07-1992)

An extension of stay may be authorized for the length of the training program for a total period of stay not to exceed two years for an H-3 trainee, or for a total period of stay not to exceed 18 months for an H-3 participant in a special education exchange visitor program.

9 FAM 41.53 N14 READMISSION AFTER THE MAXIMUM TOTAL PERIOD OF STAY HAS BEEN REACHED

(TL:VISA-371; 03-15-2002)

A nonimmigrant who has spent the maximum allowable period of stay in the United States in H and/or L status, the alien may not be issued a visa or be readmitted to the United States under the H or L visa classification, nor may a new petition, extension, or change of status be approved for that alien under INA 101(a)(15)(H) or (L), unless the alien has resided and been physically present outside the United States, (except for brief trips for business or pleasure) for the time limit imposed on the particular H category. Periods when the alien fails to maintain status shall be counted towards the applicable limit; an alien may not circumvent the limit by violating his or her status. Brief trips to the United States for business or pleasure do not interrupt the calculation of the period of foreign residence and physical presence, but do not count toward fulfillment of the required time abroad. The required periods of residence abroad prior to readmission for H nonimmigrants who have reached their maximum period of stay are as follow.

9 FAM 41.53 N14.1 H-1B Nonimmigrants

(TL:VISA-322; 10-10-2001)

An H-1B alien must have resided and been physically present outside the United States for the immediate prior year.

9 FAM 41.53 N14.2 H-2A, H-2B, and H-3 Nonimmigrants

(TL:VISA-64 08-07-1992)

An H-2A, H-2B, or H-3 alien must have resided and been physically present outside the United States for the immediate prior six months.

9 FAM 41.53 N15 EXCEPTIONS TO LIMITATIONS ON READMISSION

(TL:VISA-615; 04-28-2004)

The limitations described in N14 above shall not apply to H-1B, H-2B, and H-3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent, or was for an aggregate of six months or less per year, nor to aliens who resided abroad and regularly commuted to the United States to engage in part-time employment. These exceptions will not apply if the principal alien's dependents have been living continuously in the United States in H-4 status. The alien must provide clear and convincing proof (e.g., evidence such as arrival and departure records, copies of tax returns, records of employment abroad) that he or she qualifies for these exceptions.

9 FAM 41.53 N16 READMISSION OF H-1B FOLLOWING ACCEPTANCE OF NEW EMPLOYMENT

(TL:VISA-615; 04-28-2004)

It is quite likely that an H-1B may travel during the period following acceptance of new employment. Department of Homeland Security (DHS) considers them admissible without a new visa during the period of validity of the original petition plus ten days, provided the applicant:

(1) Is otherwise admissible;

(2) Has a valid passport and visa (even it is the original visa); and

(3) Has a dated filing receipt or other evidence that a new petition was filed in a timely fashion.

If both the prior visa and the prior petition have expired, the applicant would not be eligible for a new H-1B visa until the new petition has been approved.

9 FAM 41.53 N17 RETURN TRANSPORTATION IF H-1B OR H-2B ALIEN'S EMPLOYMENT TERMINATED INVOLUNTARILY

(TL:VISA-64; 08-07-1992)

If an H-1B or H-2B nonimmigrant is dismissed from employment before the end of his or her authorized admission by the employer who sought the alien's H-1B or H-2B status, the employer is responsible for providing the reasonable cost of transportation to the alien's last place of residence. This requirement does not apply if the alien voluntarily terminates his or her employment.

9 FAM 41.53 N18 SPOUSE AND CHILDREN OF H ALIENS

9 FAM 41.53 N18.1 Derivative Classification

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

a. The spouse and children of a principal alien classified H-1B, H-1C, H-2A, H-2B, or H-3, who are accompanying or following to join the beneficiary in the United States, are entitled to H-4 classification and are subject to the same visa validity, period of admission, and limitation of stay as the principal alien. It is not required that the spouse and children of H-1 nonimmigrants demonstrate that they have a residence abroad to which they intend to return. However, H-4 dependents of H-2 and H-3 aliens are subject to the residence abroad requirement.

b. For guidelines regarding classification of the spouse and children accompanying or following to join a Canadian citizen admitted under TN status in lieu of H-1B status. (See 9 FAM 41.59 N12.1.)

c. If an H-1B, H-2B, or H-3 alien has maintained his or her family in the United States in H-4 status, he or she cannot qualify for one of the exceptions to the maximum allowable periods of stay described in 9 FAM 41.53 N15 above.

9 FAM 41.53 N18.2 Verifying Principal Alien is

Maintaining Status

(TL:VISA-615; 04-28-2004)

When an alien applies for an H-4 visa to follow to join a principal alien already in the United States, the consular officer must be satisfied that the principal alien is maintaining H status before issuing the visa. If the consular officer has any doubt about the principal alien's status and if there are no other readily available means of verification, the consular officer may suggest to the applicant that the principal alien in the United States obtain Form I-797, Notice of Action from DHS and forward it to the applicant for presentation to the consular office.

9 FAM 41.53 N18.3 Employment in United States by H-4 Dependent Aliens Prohibited

(TL:VISA-64; 08-07-1992)

Aliens in H-4 status are not authorized to accept employment. The spouse and children of H nonimmigrants may not accept employment unless they qualify independently for a classification in which employment is, or can be, authorized. The consular officer shall take this into account in evaluating whether family members have furnished adequate evidence of their support while in the United States. H-4 aliens are permitted to study during their stay in the United States.

9 FAM 41.53 N18.4 Using B-2 instead of H-4 Classification

(TL:VISA-64; 08-07-1992)

Although the H-4 classification is provided specifically for the spouse and children of H nonimmigrants, if their planned period of stay is to be brief, such aliens could also travel as temporary visitors. Also, if the spouse or child already has a valid B-2 visa and it would be inconvenient or impossible for him or her to apply for an H-4 visa, the consular officer need not require the latter visa.

9 FAM 41.53 N19 SERVANTS OF H NONIMMIGRANTS

(CT:VISA-842; 10-10-2006)
(Effective Date: 10-04-2006)

Personal or domestic servants seeking to accompany or follow to join H nonimmigrant employers may be issued B-1 visas, provided they meet the

requirements of 9 FAM 41.31 N9.3-3.

9 FAM 41.53 N20 CERTAIN NURSES ELIGIBLE FOR H-3 CLASSIFICATION

(TL:VISA-615; 04-28-2004)

A petitioner may seek H-3 status for a nurse if it can be established that there is a genuine need for the nurse to receive a brief period of training that is unavailable in the alien's native country, and that such training is designed to benefit the nurse and the foreign employer upon the nurse's return to his or her country of origin. For a nurse to qualify for H-3 classification, certain criteria established by Department of Homeland Security (DHS) must be met. These include the alien having a license to practice where the alien was trained (unless in the United States or Canada) and the petitioner's certification that, under the laws where the training will take place, the petitioner is authorized to give such training and the alien to receive it.

9 FAM 41.53 N21 MEDICAL STUDENTS QUALIFYING AS H-3 EXTERNS

(TL:VISA-64; 08-07-1992)

A hospital approved by the American Medical Association (AMA) or the American Osteopathic Association (AOA) for either an internship or residency program may petition to classify a student attending a medical school abroad as an H-3 trainee, if the alien will engage in employment as an extern during his or her medical school vacation.

9 FAM 41.53 N22 ALIEN COMING TO TRAIN OTHERS AND/OR ORGANIZE BUSINESS

(TL:VISA-64; 08-07-1992)

An alien seeking to enter the United States to train others or to organize a business operation may be considered to be coming to a temporary position and is classifiable H-2B if otherwise qualified. For example, a cook coming to train other cooks or organize a kitchen may be classified H-2B, but a cook coming to assume a job of a permanent nature may not be accorded H-2B or any other nonimmigrant status and would have to qualify for an immigrant visa (IV).

9 FAM 41.53 N23 CLASSIFICATION OF SHEEPHERDERS

(TL:VISA-64; 08-07-1992)

Based upon a recommendation from Congress, alien sheepherders may be admitted to the United States as H-2B nonimmigrants. Consular officers may process applications for visas received from sheepherders who are the beneficiaries of H-2B petitions even if they are coming to occupy positions which are permanent or continuing in nature.

9 FAM 41.53 N24 ALIENS EMPLOYED BY U. S. EXHIBITORS AT INTERNATIONAL FAIRS OR EXPOSITIONS

(TL:VISA-64; 08-07-1992)

Alien employees of U. S. exhibitors or employers at international fairs or expositions held in the United States are classifiable as H-1B or H-2B temporary workers.

9 FAM 41.53 N25 NUMERICAL LIMITATIONS ON CERTAIN H NONIMMIGRANTS

(TL:VISA-615; 04-28-2004)

a. Given the unusually-low U.S. unemployment rate and an unexpectedly-high demand by employers for technology specialists, the numerical limitations on H-1B nonimmigrants have been in a state of flux in recent years. The most recent revision in this respect was in Public Law 106-313, the "American Competitiveness in the Twenty-first Century Act of 2000." Accordingly, the current limitations on the total number of aliens who could have been or now can be accorded H nonimmigrant visa classification in the categories indicated below is limited as follows:

   (1) Aliens classified as H-1B nonimmigrants, excluding those participating in Department of Defense (DOD) research and development or co-production projects, could not exceed: 65,000 in each fiscal year preceding 1999;

   (2) 115,000 was the initial limit for fiscal year 1999 but that was increased in Public Law 106-313 to include whatever number of aliens were issued such a visa or provided such status during the period beginning at the time the 115,000 was reached and ending September 30,1999;

(3) 115,000 was also the initial limit for fiscal year 2000; however, Public Law 106-313 specifies that any H-1B petition filed prior to September 1, 2000 (whenever approved) is to be counted against the ceiling for FY-2000 and increased the 115,000 ceiling in the same fashion as for FY-99;

(4) The new total limit for following years are 195,000 each in fiscal years 2001, 2002 and 2003;

(5) Aliens classified as H-1B nonimmigrants to work in Department of Defense (DOD) research and development or co-production projects may not exceed 100 at any time;

(6) Aliens who are employed by (or have an offer of employment from) an institution of higher education, a related or affiliated nonprofit entity, or a nonprofit or governmental research organization are not to be counted against these ceilings. Such aliens will be counted if they move from such a position to one which is within the ceiling applicability;

(7) Aliens classified as H-2B nonimmigrants may not exceed 66,000 during any fiscal year; and

(8) Aliens classified as H-3 participants in special education exchange visitor programs may not exceed 50 in any given fiscal year.

b. These numerical limitations are controlled by Department of Homeland Security (DHS) which allocates a number to each alien included in a new petition when the petition is filed. Petitioners are required to notify the appropriate DHS Service Center Director when numbers are not used, so that they may be reassigned. Consequently, the data provided above is solely for informational purposes. Consular officers need not concern themselves about the availability of visa numbers for beneficiaries of approved petitions, nor need they inform DHS when H visa applications in affected categories are abandoned or denied.

c. The dependents of principal aliens in these categories shall not be counted against the numerical limitations.

9 FAM 41.53 N26 FORMER EXCHANGE VISITORS SUBJECT TO TWO-YEAR FOREIGN RESIDENCE REQUIREMENT

(TL:VISA-371; 03-15-2002)

For instructions regarding requests for waivers of the two-year foreign residence requirement by H visa applicants who are former exchange visitors and subject to the two-year residence abroad requirement of INA 212(e),

see 9 FAM 40.202 Regulations and 9 FAM 40.202 Notes.

9 FAM 41.53 N27 FREE TRADE AGREEMENT NONIMMIGRANT PROFESSIONALS

(CT:VISA-759; 08-15-2005)

a. The President signed free trade agreements (FTAs) with Chile and Singapore on September 3, 2003. The FTAs with Chile and Singapore were authorized by Congress in Public Law 108-77 and Public Law 108-78 respectively. Both agreements became effective on January 1, 2004.

b. The FTAs with Chile and Singapore include immigration provisions that allow for the temporary entry of business professionals into the territory of the trading partners in order to facilitate free trade opportunities. The temporary entry of nonimmigrant professionals is provided for in Chapter 14 of the U.S.-Chile Agreement and in Chapter 11 of the U.S.-Singapore Agreement. The temporary entry chapters in both agreements establish four categories of nonimmigrant entry for business purposes. Three of the categories, business visitors, traders and or investors, and intra-company transferees, qualify for visas under the existing B-1, E-1/E-2 and L-1/L-2 visa categories. The FTAs establish a new fourth category of temporary entry for nonimmigrant professionals, the H-1B1 category.

9 FAM 41.53 N28 H-1B1 REQUIREMENTS

9 FAM 41.53 N28.1 H-1B1 applications subject to numerical limitations

(TL:VISA-615; 04-28-2004)

a. Annual numerical limits are set for aliens who may obtain H-1B1 visas. One thousand four hundred professionals from Chile and 5,400 professionals from Singapore are allowed to enter the U.S. annually. These numerical limits fall within and will be registered against the existing annual numerical limit (currently 65,000) for H-1B aliens. Only principals are counted against each country’s respective numerical limitation. Initial applications for H-1B1 classification, as well as the sixth and all subsequent extensions of stay, are counted against the H-1B1 annual numerical limitations.

b. At the end of each fiscal year, unused H-1B1 numbers will be returned to that year’s global numerical limit and will be made available to H-1B aliens during the first 45 days of the new fiscal year.

c. Department of Homeland Security (DHS) is required to keep numerical count of the H-1B1 visas issued. To assist DHS in meeting this responsibility, consular officers (CO) will be required to report to the Directorate for Visa Services at designated intervals the number of visas issued to first-time H-1B1 visa applicants. (Reporting procedures are currently being developed. Guidance will be provided once procedures have been established).

9 FAM 41.53 N28.2 No petition required

(TL:VISA-615; 04-28-2004)

An employer of an H-1B1 professional is not required to file a petition with DHS. Instead, an employee will present evidence for classification directly to the consular officer at the time of visa application.

9 FAM 41.53 N28.3 Applicants subject to labor Condition

(TL:VISA-615; 04-28-2004)

a. Employers must submit a Labor Attestation for foreign workers from Chile or Singapore under the H-1B1 program. The law requires the Department of Labor (DOL) to certify to the Department of State (DOS) that the appropriate Labor Condition Application (LCA), ETA Form 9035, Labor Condition Application for H-1B Nonimmigrants, has been filed with DOL. If certified, the employer transmits a copy of the signed, certified LCA to the alien together with a written offer of employment. At the time of visa application, the alien will present a certified copy of the LCA, clearly annotated by the employer as "H-1B1 Chile" or "H-1B1 Singapore," as proof of filing.

b. The validity of the visa should not exceed the validity period of the LCA. Although still under discussion, the Department and DHS have agreed to an 18-month minimum validity period at the time an applicant applies for an H-1B1 visa.

9 FAM 41.53 N28.4 H-1B1 Professionals in specialty occupations

(TL:VISA-615; 04-28-2004)

a. The new H-1B1 category allows for the entry of nonimmigrant professionals in "specialty occupations". The definition of "specialty occupation" set forth in both FTAs is presently identical to the regulatory definition for H-1Bs, i.e., "an occupation that requires:

(1) Theoretical and practical application of a body of specialized knowledge; and

(2) Attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States" (8 CFR 214.2). Consular officials should refer to this section for guidance in connection with an applicant's qualifications as an H-1B1 professional.

b. Both agreements allow for alternative credentials for certain professions. The U.S. has agreed to accept alternative credentials for Chilean and Singaporean nationals in the occupations of Disaster Relief Claims Adjuster and Management Consultant with a combination of specialized training and 3 years experience in lieu of the standard degree requirements. For Chilean nationals only, Agricultural Managers and Physical Therapists can also qualify with a combination of a post-secondary certificate in the specialty and three years experience in lieu of the standard degree requirements. Consular officers may accept specified documentary evidence of alternative credentials.

9 FAM 41.53 N28.5 Temporary Entry

(TL:VISA-615; 04-28-2004)

a. Both agreements provide for the temporary entry of professionals into the United States. Temporary entry is defined in both agreements as "an entry into the United States without the intent to establish permanent residence. The alien must satisfy the consular officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. The circumstances surrounding an application should reasonably and convincingly indicate that the alien's temporary work assignment in the United States will end predictably and that the alien will depart upon completion of the assignment. An intent to immigrate in the future, which is in no way connected to the proposed immediate trip, need not in itself result in a finding that the immediate trip is not temporary. An extended stay, even in terms of years, may be temporary, as long as there is no immediate intent to immigrate.

b. H-1B1 nonimmigrant professionals are admitted for a one-year period renewable indefinitely, provided the alien is able to demonstrate that he or she does not intend to remain or work permanently in the United States.

9 FAM 41.53 N28.6 Licensing Requirements

(TL:VISA-615; 04-28-2004)

For admission into the United States in a specialty occupation, an alien must

meet the academic and occupational requirements. However, the requirements for classification as an H-1B1 nonimmigrant professional do not include licensure. Licensure to practice a given profession in the United

States is a post-entry requirement subject to enforcement by the appropriate state or other sub-federal authority. Proof of licensure to practice in a given profession in the United States may be offered along with a job offer letter, or other documentation in support of an application for an H-1B1 visa. However, admission and or classification should not be denied based solely on the fact that the applicant does not already hold a license to practice in the United States.

9 FAM 41.53 N28.7 Fees

(TL:VISA-615; 04-28-2004)

A Special fee may be imposed for initial classification as an H-1B1 worker, if such a fee is required for the global H-1B program. Currently there is no special fee required for H-1B or H-1B1.

9 FAM 41.53 N28.8 H-1B1 Visa Application Procedures

(CT:VISA-893; 06-06-2007)

a. A national of Chile or Singapore must meet the general academic and occupational requirements for the position pursuant to the definition cited. Proof of alternative credentials must be submitted for certain professions as discussed in 9 FAM 41.53 N27 b.

b. An applicant must submit evidence that his or her employer has filed a Labor Condition Application (LCA) with Department of Labor (DOL) covering the applicant's position. A certified form ETA-9035 clearly annotated as "H-1B1 Chile" or "H-1B1 Singapore" must be submitted as evidence of filing.

c. An applicant must submit evidence that the employer has paid any applicable fee imposed.

d. An applicant must submit evidence that his or her stay in the United States will be temporary (a letter or contract of employment should be evidence that the employment is being offered on a temporary basis).

e. An applicant must pay the Machine Readable Visa (MRV) fee or provide proof of payment.

9 FAM 41.53 N29 BACKGROUND

(CT:VISA-893; 06-06-2007)

Your primary responsibility in visa adjudication is to carry out the requirements of U.S. immigration law. Occasionally, you may discover indications of possible violations of other U.S. laws, even if you issue a visa. This note outlines types of possible violations of U.S. labor law, and tells you how to report them to the Department of Labor (DOL). In most of these situations, you likely would still issue a visa (see 9 FAM 41.53 N2.3 for information on when petitions should be returned to DHS for possible revocation).

9 FAM 41.53 N29.1 What Should I Report?

(CT:VISA-893; 06-06-2007)

a. *Only report violations that occurred in the United States within the 12 months immediately prior to DOL's receipt of the report of violation. DOL is not authorized to investigate other violations.*

b. *For a violation to have occurred in the United States, H-1B workers who are allegedly not being employed correctly must already have been in the U.S. and employed by the petitioner/employer. It is difficult to show that a violation occurred within the last 12 months. However, if the applicant provides tax documents for the preceding calendar year and these show evidence of significant underpayment of wages without explanation (illness, return to country of origin for a portion of the year, etc.) then DOL could file a labor complaint up until the end of the current calendar year.*

c. *You also may provide evidence of an ongoing labor violation by a petitioner by reviewing the petitioner's quarterly employment tax documents in relation to the number of employees the employer states it has on the Form I-129, Part 5 and the number of petitions for that employer for which still valid visas have been issued. For example, the petitioner's quarterly tax documents may show that unemployment and social security taxes were paid for 10 employees, which is the same number the employer reports on the Form I-129. A CCD review may show 50 visa applications in the CCD for that petitioner, however, and that 30 of those visas are still valid. While there may be an explanation for this, such a large discrepancy implies there may be no employer/employee relationship between the petitioner and the petitioned-for aliens or that the aliens are not being appropriately compensated, a situation calling for a labor violation complaint.*

d. *You should report a possible labor violation in any of the following circumstances:*

   (1) Underpayment of the Required Wage

The Required Wage is the higher of either the Prevailing Wage for the occupation in the geographic area of intended employment, and listed on a Labor Condition Application (LCA), or the Actual Wage paid to all other individuals, including United States workers, employed at the worksite with similar experience and qualifications for the specific employment in question. The Required Wage can include reasonable costs for housing and transportation as long as this arrangement is agreed to by the employee, voluntarily and in writing. In addition, these costs must be reported on the employer's payroll records as earnings for the employee and all appropriate taxes and fees must be paid. Evidence of underpayment might constitute a matter for enforcement follow-up by the DOL and should be referred.

(2) Alien required to pay fees and travel reimbursement

DOL regulations provide, at 20 CFR 655.731(c)(7)(iii)(C), that employers cannot require that a temporary worker pay for petition and/or fraud fees. Complete details can be found at Fact Sheet #62H on DOL's Web site. Consider referring such a case for consideration of an enforcement action.

(3) Benching

"Benching" is the common term to describe not paying workers when there is no specific job available. Benching is most often seen in IT related professions. 20 CFR 655.731(c)(6)(ii) requires that a petitioner begin paying a H-1B nonimmigrant the required wage beginning 30 days after the date of admission to the United States in H-1B status, even if the alien has not yet entered into employment (i.e., making oneself available for work or otherwise coming under the control of the employer). If the alien is already present in the United States on the date when the petition is approved, the employer is required to pay the required wage beginning 60 days after the date the alien becomes eligible to work for the employer (i.e., 60 days after the latter of the date of need stated on the H-1B petition or the date that USCIS changes the alien's status to H-1B). A complete explanation can be found at Fact Sheet #62I on DOL's Web site. If you have evidence that the employer failed to satisfy this requirement, you should report it. Some employees in a benching situation report wages on Form IRS-1099-C, Cancellation of Debt, identifying themselves as independent contractors, not on a W-2 as would be the case for a true employee.

(4) Systematic LCA Violations, Including Off-Site Work

Labor Condition Applications (in H-1B cases) are made for a specific

location, and temporary workers are supposed to be living and working in that location. DOL regulations permit short-term placement of a worker, for a period of no more than 30 or (if the alien maintains ties to the original and approved worksite, such as maintenance of a residence) 60 days within a one year period, as described in DOL Fact Sheets found at Fact Sheet #62K on DOL's Web site and Fact Sheet #62J on DOL's Web site. USCIS has issued guidance on work in more than one location for H-1B beneficiaries. A labor contractor or consultant petitioning for H-1B workers to work at multiple client sites must provide a detailed itinerary of those sites at the time the petition is filed. A Press Release on this subject is available at Public Notice, March 24, 2006. You may report an employer's systematic LCA violations.

9 FAM 41.53 N29.2 How Do I Report Violations?

(CT:VISA-893; 06-06-2007)

Email information to the Fraud Prevention Unit at the Kentucky Consular Center (KCC) at FPMKCC@state.gov or mail it to:

Attention: FPU
Labor Complaint
3505 N. Hwy 25W
Williamsburg, KY 40769

You must include the "Consular Report of Labor Violation" memo (exemplar available on the Fraud Prevention Program (FPP's) Web site or by asking post's FPP desk officer) and must scan complaints and supporting documents into the CCD record and identify them as supporting evidence for a Labor Violation. KCC personnel will pull the supporting documentation from the CCD, and will track all labor violation complaints.

9 FAM 41.53 N29.3 What Will Department of Labor (DOL) Do With a Complaint?

(CT:VISA-893; 06-06-2007)

If DOL finds that a labor violation has occurred, it may impose penalties in the form of back pay reimbursement to injured parties, fines to the company, and/or a ban on the filing of further Labor certifications by the company. In some cases, the DOL may apply the ban to any company associated with the violator.

9 FAM 41.53 N29.4 Information Available from Department of Labor (DOL)

(CT:VISA-893; 06-06-2007)

a. *DOL has printed business cards with information on legal protections for H-1B and H-2 workers. These cards are a simple and effective way to get the word out to each beneficiary. You may email Barnett.Delicia@dol.gov to request cards. Specify the type of card (H-1B or H-2), the quantity of each type, and the mailing address at post.*

b. *Administrative actions on labor violations may be found at OALJ on DOL's Web site. Individuals wishing to file labor violation complaints can find instructions at H-1B Nonimmigrant Information on DOL's Web site.*

c. *DOL has helpful Fact Sheets on immigration related issues and particularly on H1B issues. Some have been referenced in 9 FAM 41.53 N29 and all are available on DOL's Web site at Topical Fact Sheet Index.*